1976

Frisco Joe's, Inc., Donald Vaughan Tolman and Joaana Tolman v. Elis Y. Peay, Gordon Hall and Kenneth Hostetter : Brief of Respondent

Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

DOCKET NO. 14515 RP

SUPREME COURT

OF THE STATE OF UTAH

FRISCO JOES, INC., a Utah corporation, DONALD VAUGHN TOLMAN and JOANNA TOLMAN,

Plaintiffs-Appellants,

vs.

ELLIS Y. PEAY, GORDON HALL and KENNETH HOSTETTER,

Defendants-Respondents

Case No. 14,515

BRIEF OF RESPONDENT PEAY IN OPPOSITION TO PETITION FOR REHEARING

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IN THE SUPREME COURT

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FRISCO JOES, INC., a Utah corporation, DONALD VAUGHN TOLMAN and JOANNA TOLMAN, Plaintiffs-Appellants, vs. ELLIS Y. PEAY, GORDON HALL and KENNETH HOSTETTER, Defendants-Respondents	Case No. 14,515

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BRIEF OF RESPONDENT PEAY IN OPPOSITION
TO PETITION FOR REHEARING

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the State of Utah: The respondent respectfully submits that the petition for a rehearing should be denied.

THE PETITION PRESENTS NO QUESTION WHICH WAS NOT FULLY CONSIDERED IN THE ORIGINAL DECISION OF THIS COURT.

As stated in 5 Am Jr. 2d, Appeal and Error, Sec. 988, rehearings are not proper merely for the purpose of reargument. In this appeal, petitioners simply raise again the same argument of a "Sale" which they urged in the trial court and also presented to this court through their appellate argument and brief. The issue has been decided, yet your petitioners desire its' reargument in the form of a hearing.

The nagging problem inherent in the "Sale" theory

is its' continuing reliance on petitioner's version of the facts rather than on the facts as found by the trial court. In paragraph 14 of its Findings of Fact, the trial court found as follows:

> "14. On or about April 1, 1975, defendant Peay was informed through the officers and agents of Restaurant Stores and Equipment, that the kitchen equipment and certain other items of personal property used in the operation of Frisco Joes, an eating establishment, was being purchased from Restaurant Stores and Equipment, on a promissory note and security agreement, which had been assigned to Walker Bank. That the payment provided for in said promissory note and security agreement were in arrears, and that Restaurant Stores and Equipment intended to foreclose on the said items of personal property and repossess the same unless the note and security agreement were brought current. Thereafter, defendants Hall and Hostetter made arrangements with Walker Bank and Restaurant Stores and equipment to take over the delinquent loan on the said restaurant equipment and other items of personal property and to date of trial had paid $300.00 to Restaurant Stores and Equipment on arrearages, and had paid $1,404.00 to Walker Bank on the said note and security agreement.

This finding specifically negates any implication of a "sale" of the personal property by defendant/respondent Peay to defendants Hall and Hostetter. The evidence adduced at trial amply supports this finding, as the following quotations from the trial transcript illustrate.

Defendant Hall testified that he and Hostetter were purchasing the property by paying off the delinquent note which encumbered it.

"Q. What is your understanding regarding the ownership of that personal property?

A. That we were purchasing that property.

Q. From Whom?

A. From -- We were paying the note from Restaurant Stores and Equipment and Walker Bank." (TR. 144)

Defendant Peay testifed that he did not "sell" Hall and Hostetter the equipment.

"Q. And this was even after you had locked him out and you had released the building and sold the equipment to Mr. Hall and Mr. Hostetter?

A. No, I hadn't sold them the equipment.

Q. Well, you had your attorney prepare an agreement to sell it to them and you had received a down payment, hadn't you?

A. I received $200.00, and then when I found that it was going to be repossessed I told them they had better go and deal direct with the company, and I applied their $200.00 to rent, that they had given me." (TR 186).

The record clearly shows that the $200.00 payment which petitioners allege was made from Hall and Hostetter to Peay to purchase equipment was actually used to pay rent. As defendant Hall testifed:

> ". . . (I)nstead of paying him (Peay) $400.00 for May's lease payment we paid $200.00 with the understanding that the prior $200.00 that we had put down on the equipment was to go from May's lease and that we would take over payments to Walker Bank beginning with April and pick up the amount of past dues that Restaurant Stores and Equipment had paid to Walker Bank in the amount of $795.00, I think it was." (TR 151).

The petitioners, in support of their "sale" theory objected to the trial courts finding by filing their "Objections to Proposed Findings of Fact and Conclusions of Law and Proposed Additional Findings of Fact." In paragraph 3 of their "Objections", petitioners asked the court to revise this proposed finding to show "that the defendant Peay leased the premises and sold the personal property owned by the plaintiffs to the defendants Hall and Hostetter." (emphasis added).

In paragraphs 4 and 5 of their "Objections" petitioners specifically asked the trial court to make certain additional findings of fact in their favor. They requested the court to find that,

> "4. The defendant Peay sold all of the personal property in the building and owned by the plaintiffs to the defendants Hall and Hostetter and received a check from Hall and Hostetter in the sum of $1,000.00 on or about April 1, 1975, $200.00 of which was the initial payment on the personal property.
>
> 5. Defendants Hall and Hostetter claim to be the owners of all of the personal property situated in the building by reason of purchasing the property from the defendant Peay."

The trial Judge, however, who had the opportunity of seeing and hearing the witnesses and passing on their credibility, specifically rejected the petitioners objections and proposed findings of fact, entered the finding reproduced as paragraph 14 above, and entered the following conclusion of law:

> "The evidenced fails to establish by a preponderance thereof any conversion of personal property by any of the defendants."

Though petitioners persistently and effectively argued their theory of a "sale", the court found "no sale". Such a finding by the trial court should not be disturbed on appeal. See Hardy v. Hendrickson 27 Utah 2d 251, 495 P. 2d 28 (1972), First Security Bank of Utah, N.A. v. Wright, 521 P.2d 563 (1974).

The petitioners then argued their theory of a "sale" based upon their own version of the facts, in this court. The characterization of the facts used by the petitioners is simply not in accord with the facts as found by the trial court, nor as affirmed by the Supreme Court. The trial court negated any implication of a "sale" by holding that there was no conversion of any personal property by any of the defendants. This court, in considering the same question, properly approved the decision of the trial court by holding that there was no wrongful exercise of control over any of the personal property in violation of the rights of its owner. The petitioners' inference that this court did not consider the "sale" aspect of the case because the term "sale" was not specifically treated in the opinion is ill founded. A court's silence on a material point must be regarded as a finding against the party having the burden of proof. See generally, Ellis vs. Citizens' Nat. Bank. 183 Pac. 34, 6 A.L.R., 166, 171 (1918).

The issue and question of a "sale" of personal property by the defendant/respondent Peay to the defendants Hall and Hostetter, in violation of plaintiff/petitioners rights has been fully developed, briefed, and argued both here and in the trial court. Petitioner's request for rehearing of the same issue is nothing more than an

application for reargument. Such subject matter is not proper for rehearing. See 5 Am Jur. 2d Appeal and Error, Sec 988, Owens v. Hagenbeck-Wallace Shows, 192 A. 464, 112 ALR 113, 124 (1937) New York Life Ins. Co. vs. Nashville Tr. Co. 292 S.W. 2d 749, 59 ALR 2d 1086, 1107 (1918).

WHEREFORE, it is respectfully requested that the Petition for Rehearing be denied.

DATED February 15, 1977.

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